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Case No. 3:16-cv-00108-MMD-VPC

## ORDER

**V.**

Respondents.

## I. BACKGROUND

Deloney attempted to file a direct appeal, which the Nevada Supreme Court dismissed on June 13, 2013, for lack of jurisdiction because the notice of appeal was filed one day late. (Exh. 53.) The Nevada Supreme Court denied rehearing on September 25, 2013, and remittitur issued on October 24, 2013. (Exh. 59.)

<sup>1</sup>Exhibits referenced in this order are exhibits to respondents' motion to dismiss (ECF No. 13) and are found at ECF Nos. 14-16, 18-19.

1 On January 29, 2014, Deloney filed a proper person state postconviction petition.  
2 (Exh. 60.) The parties stipulated that Deloney could raise all claims—including those he  
3 should have raised on direct appeal—in his state postconviction petition. (Exh. 70.) The  
4 state district court ultimately quashed the postconviction petition. (Exh. 74.) On July 14,  
5 2015, the Nevada Supreme Court affirmed the state district court, and remittitur issued  
6 on August 10, 2015. (Exhs. 87, 88.)

7 Deloney dispatched his federal habeas petition for mailing about February 14,  
8 2016 (ECF No. 1-1). Respondents have moved to dismiss the petition as time-barred  
9 (ECF No. 13).

## 10 **II. LEGAL STANDARD — STATUTE OF LIMITATIONS**

11 The Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on  
12 April 24, 1996, and imposes a one-year statute of limitations on the filing of federal habeas  
13 corpus petitions. 28 U.S.C. § 2244(d). The one-year time limitation can run from the date  
14 on which a petitioner's judgment became final by conclusion of direct review, or the  
15 expiration of the time for seeking direct review. 28 U.S.C. § 2244(d)(1)(A). Further, a  
16 properly filed petition for state postconviction relief can toll the period of limitations. 28  
17 U.S.C. § 2244(d)(2).

18 A petitioner may be entitled to equitable tolling if he can show “(1) that he has  
19 been pursuing his right diligently, and that (2) some extraordinary circumstance stood in  
20 his way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2009) (quoting  
21 prior authority). Equitable tolling is “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d  
22 1104, 1107 (9th Cir. 1999) and “the threshold necessary to trigger equitable tolling is very  
23 high, lest the exceptions swallow the rule,” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th  
24 Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000)). The  
25 petitioner ultimately has the burden of proof on this “extraordinary exclusion.” 292 F.3d at  
26 1065. He accordingly must demonstrate a causal relationship between the extraordinary  
27 circumstance and the lateness of his filing. *E.g.*, *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th  
28 Cir. 2003).

1 Ignorance of the one-year statute of limitations does not constitute an extraordinary  
2 circumstance that prevents a prisoner from making a timely filing. See *Rasberry v. Garcia*,  
3 448 F.3d 1150, 1154 (9th Cir. 2006) (“a *pro se* petitioner’s lack of legal sophistication is  
4 not, by itself, an extraordinary circumstance warranting equitable tolling”).

### 5 **III. DISCUSSION**

6 Deloney alleges that his plea counsel rendered ineffective assistance, that his  
7 *Miranda* rights were violated, and that the state district court erred by not granting his  
8 state petition (ECF No. 7).

9 Ground 1: Trial counsel provided ineffective assistance because he  
10 “failed to discuss the pre-sentence interview and how the pre-sentence  
11 report would be used at sentencing,” failed to inform petitioner of his right  
12 to remain silent during the pre-sentence interview, and failed to attend the  
pre-sentence interview, which resulted in the imposition of “a more harsh  
[sic] sentence than the petitioner feel[s] he deserves.” (*Id.* at 13-14, 22.)

13 Ground 2: (a) Petitioner’s Fifth Amendment right against self-  
incrimination and rights under *Miranda* were violated because he was not  
14 informed of his *Miranda* rights before his pre-sentence interview, and (b)  
trial counsel provided ineffective assistance because he failed to inform  
15 petitioner of his right to have counsel at his pre-sentence interview or remain  
silent during the interview. (*Id.* at 14-15, 17-18, 22-23.)

16 Ground 3: The state district court erred by not granting petitioner’s state  
petition because the state did not make an argument against petitioner’s  
17 state petition. (*Id.* at 15-17.3.)

18 Ground 4: Trial counsel provided ineffective assistance because he  
19 “failed to have his investigator/expert conduct an investigation of the case  
as to the identification of petitioner” “prior to the time petitioner entered his  
20 plea” by interviewing “the witnesses who had identified him as the man that  
was aired on local TV.” (*Id.* at 19-20.)

21 Ground 5: Trial counsel provided ineffective assistance because he  
22 “failed to secure an expert who could have reviewed the videotape which  
was used to identify the petitioner as the person alleged to have committed  
23 the crime,” “prior to the appellant’s plea being entered.” (*Id.* at 20-21.)

24 Ground 6: Trial counsel provided ineffective assistance because he  
failed to “inform petitioner that he could be sentenced to more than the  
25 minimum sentence” and that “the trial court could sentence him up to the  
maximum on each count.” (*Id.* at 21.)

26 Ground 7: Trial counsel provided ineffective assistance because he  
27 failed to object to the use of petitioner’s juvenile records in the state’s motion  
to increase bail.” (*Id.* at 24.)

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1 Deloney's thirty (30) days to file a notice of appeal from his judgment of conviction  
2 with the Nevada Supreme Court expired on April 10, 2013. See NRAP 4(b)(1)(A); (Exh.  
3 53). The AEDPA one-year statute of limitations thus began to run on April 10, 2013.  
4 Deloney filed a notice of appeal on April 11, 2013. (Exh. 40.) As noted earlier, on June  
5 13, 2013, the Nevada Supreme Court dismissed the appeal for lack of jurisdiction  
6 because it was untimely. (Exh. 53.) As no properly filed appeal was pending, no time is  
7 tolled between the time Deloney filed his untimely notice of appeal and the date the  
8 Nevada Supreme Court dismissed the appeal.

9 Next, Deloney filed a state postconviction habeas petition on January 29, 2014.  
10 (Exh. 60.) At that time, 294 days of the AEDPA limitations period had elapsed. The state  
11 postconviction petition was resolved on August 10, 2015, when remittitur issued. (Exh.  
12 88.) The AEDPA one-year deadline expired 72 days later. However, Deloney took no  
13 action until 143 days later, on December 31, 2015, when he attempted to file a 28 U.S.C.  
14 § 2254 federal petition in state court. (Exh. 92.) Thus, the statute of limitations expired 72  
15 days before the federal petition was filed in state court and 125 days before this court  
16 received a federal habeas petition about February 14, 2016. This federal petition is,  
17 therefore, time-barred, unless Deloney is entitled to equitable tolling of the AEDPA statute  
18 of limitations.

19 In his opposition, Deloney basically recounts the procedural history of his state  
20 case (ECF No. 26). He argues that the state district court deemed his notice of appeal  
21 timely in the course of his state postconviction proceedings. This misrepresents the  
22 record, which reflects only that the parties stipulated that Deloney could raise all claims  
23 that should have been raised on direct appeal, along with all other postconviction claims,  
24 in his state postconviction petition. Deloney has failed to demonstrate that his petition  
25 should not be dismissed as untimely.

26 Accordingly, respondents' motion to dismiss this petition as time-barred is granted.  
27 This petition is dismissed with prejudice.

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